

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDY MAYFIELD CURRY-HOWARD,

Defendant-Appellant.

UNPUBLISHED

April 19, 2012

No. 302882

Kent Circuit Court

LC No. 10-007340-FC

Before: HOEKSTRA, P.J., and SAWYER and SAAD, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of first-degree criminal sexual conduct, MCL 750.520b(1)(f), and two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a). Defendant was sentenced to 9 to 40 years' imprisonment for the first-degree criminal sexual conduct conviction, and to 6 to 15 years' imprisonment for each of the third-degree criminal sexual conduct convictions. For the reasons stated in this opinion, we affirm.

I. FACTUAL BACKGROUND

Defendant's convictions arise from an incident occurring in May 2010. Defendant and the 15-year-old victim were both attending a credit recovery program at Central High School in Grand Rapids, Michigan. On the day of the sexual assault, the victim left the classroom to go to her locker and defendant followed her. As the victim tried to walk back to class defendant forcefully attempted to kiss her. The victim informed defendant that she did not want to kiss him, and defendant responded by informing the victim that he wanted to have sexual intercourse with her. The victim again informed defendant that she was not interested in a sexual relationship. Defendant became angry, and tried to pull the victim's pants down. The victim was able to pull her pants back up twice, but the third time defendant pulled her pants all the way down and picked her up and placed her on the floor. Defendant grabbed the victim's hands and placed his body on top of hers so she could not move. Defendant digitally penetrated the victim's vagina and then inserted his penis inside the victim's vagina for about two minutes. The victim told defendant she did not want to have sexual intercourse about 15 times while he was penetrating her. Defendant eventually got off the victim and allowed her to pull her pants up. The victim was crying.

The victim returned to class before defendant, and informed her teacher that she had a family emergency and that she had to leave. The teacher testified that the victim was sad and

crying. Defendant returned to the classroom five minutes later. The teacher asked defendant if he was with the victim, and defendant told her that he was at McDonalds.

The victim told a friend and a school security guard about the sexual assault two days later. After the victim accused defendant she received threats from several people at school. When the victim confronted defendant he said “you wanted me to put it in.” The victim ended up switching schools, changing her cellular telephone number, and seeking counseling. The victim was prescribed medication, which she attempted to overdose on. The victim testified that she withdrew from people, was constantly afraid, and lost her faith.

During the trial, a security video showing the hallway where the sexual assault occurred was introduced as evidence and played for the jury. The video depicted defendant and the victim together in the hallway; it showed defendant trying to kiss the victim and trying to pull the victim’s pants down. The video showed defendant lifting the victim up and laying on top of her on the floor.

The defense called two witnesses, both high school students who knew defendant and the victim. Both of the defense witnesses’ testimony suggested that the victim consented to sexual intercourse with defendant. One of the defense witnesses testified that defendant thought the victim was 16 years old. Defendant did not testify at his trial.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that defense counsel provided ineffective assistance of counsel. Defendant makes 13 specific allegations to support his argument that defense counsel was ineffective.

Defendant filed a motion to remand for an evidentiary hearing pursuant to MCR 7.211(C)(1) after his trial. This Court denied defendant’s request because it found that defendant failed to satisfy the requirements of MCR 7.211(C)(1). *People v Curry-Howard*, unpublished order of the Court of Appeals, entered November 3, 2011 (Docket No. 302882).

Because no evidentiary hearing was held in regard to defendant’s claims of ineffective assistance of counsel, our review of defendant’s claims is limited to errors apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

In order to prevail on an ineffective assistance of counsel claim, the burden is on the defendant to demonstrate that defense counsel’s performance fell below an objective standard of reasonableness, and that the deficiency so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Prejudice occurs if there is a “reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.” *Id.* at 312 (quotation and citation omitted).

In his brief on appeal, defendant states that his allegations “cannot be reviewed” by this Court “as a matter of record,” and that an evidentiary hearing is accordingly required for proper review. However, we find that the record is adequate in regard to several of defendant’s claims.

The first claim for which the record is adequate is defendant's claim that defense counsel was ineffective because he failed to effectively cross examine the victim and impeach her regarding her statement that defendant used force and coercion. Further, defendant claims defense counsel failed to point out that the security video showed the victim voluntarily kiss defendant. "Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008)." Defendant has not demonstrated that defense counsel's chosen strategy regarding the victim's cross-examination fell below an objective standard of reasonableness. "A particular strategy does not constitute ineffective assistance of counsel simply because it does not work." *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004). Moreover, because the video was played for the jury, the jury would have been aware of any voluntary kiss depicted in the video. Therefore, defendant has failed to meet his burden of proving ineffective assistance of counsel because he has not argued that counsel's performance fell below an objective standard of reasonableness and he has not indicated how counsel's alleged failures prejudiced his case. *Pickens*, 446 Mich at 302-303, 312.

Next, defendant claims that defense counsel was ineffective because he "violated defendant's right to be present" when the presentation of defendant's witnesses was discussed in the trial court judge's chambers. Even assuming that defense counsel met with the prosecution and the trial court without defendant to discuss the presentation of witnesses, defendant cannot demonstrate that defense counsel's performance fell below an objective standard of reasonableness. A criminal defendant has the right to be present at trial, and also during voir dire, selection and challenges to the jury, presentation of the evidence, summation by counsel, instructions to the jury, rendition of the verdict, imposition of the sentence, and any other stage of the trial where the defendant's substantial rights might be adversely affected. *People v Mallory*, 421 Mich 229, 246-247; 365 NW2d 673 (1984). A discussion between the attorneys regarding the presentation of defendant's witnesses is not a stage of trial explicitly recognized by our Supreme Court as one where defendant must be present. Further, defendant has not argued or demonstrated that his absence from the discussion might have adversely affected his substantial rights. *Id.* Accordingly, defendant has not met his burden of demonstrating ineffective assistance of counsel. *Pickens*, 446 Mich at 302-303, 312.

Next, defendant argues that defense counsel was ineffective because he failed to understand the Rape Shield Act and the rules of evidence, and as a result, defense counsel failed to present a viable defense "in showing and proving [the victim's] motives and bias in raising false accusations against defendant." Defendant has not demonstrated that defense counsel's performance fell below an objective standard of reasonableness because the record actually supports the conclusion that defense counsel did understand the Rape Shield Act and the rules of evidence. On the first day of trial, defense counsel addressed the trial court regarding the admissibility of defense witnesses. Defense counsel's discussion of the Rape Shield Act and the rules of evidence in the course of making his argument to the trial court demonstrated that he understood the law. Accordingly, defendant has not demonstrated that defense counsel fell below an objective standard of reasonableness. *Id.* at 302-303. Further, defendant has not presented an argument on appeal regarding specifically what the victim's "bias and motives" might have been, or how the absence of that information affected the outcome of the trial. In light of the victim's unequivocal testimony regarding defendant's actions, we conclude that defendant has failed to demonstrate prejudice even if defense counsel's actions fell below an

objective standard of reasonableness. *Id.* at 312; see also *People v Smith*, 205 Mich App 69, 71; 517 NW2d 255 (1994), *aff'd* 450 Mich 349 (1995) (victim's testimony alone is sufficient to support a conviction).

Next, defendant argues that defense counsel was ineffective because he failed to object to the trial court's response of "no" to a jury question. During deliberations, the jury asked the trial court: "if the defendant was misled to believe that the victim was 16, does the law still apply of her being 13, 14, and 15?" A person is guilty of third-degree criminal sexual conduct if the person engages in sexual penetration with another person and "that other person is at least 13 years of age and under 16 years of age." MCL 750.520d(1)(a). Accordingly, the answer to the jury's question is "yes." The trial court first answered "no," but the prosecution immediately asked to approach and the trial court explained to the jury that it misspoke and that the answer was "yes." Defense counsel did not object to the trial court's original mistake, but given the prosecutor's immediate request for a bench conference, defense counsel may not have time to object. Moreover, any potential prejudice from the trial court's misstatement of the law was prevented by the trial court's immediate correction. Defendant has failed to show that defense counsel's representation fell below an objective standard of reasonableness or that he was prejudiced. *Pickens*, 446 Mich at 302-303, 312.

Next, defendant maintains that defense counsel was ineffective because he failed to properly advise defendant regarding waiving his right to testify. The record in this case demonstrates that defense counsel discussed whether defendant should testify with defendant. Accordingly, defendant has not demonstrated that defense counsel's performance fell below an objective standard of reasonableness. *Id.* at 302-303. Further, defendant does not argue that defense counsel's alleged failure to properly advise him affected to outcome of the proceedings, accordingly, defendant has not demonstrated the required prejudice. *Id.* at 312.

Next, defendant argues that defense counsel failed to interview Carisa Richardson before calling her to testify, and accordingly, failed to elicit testimony regarding the fact that the victim told Richardson she "lied to the police." The failure to reasonably investigate the case can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). When claiming ineffective assistance due to defense counsel's unpreparedness, a defendant is required to show prejudice resulting from the alleged lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Here, even if defense counsel failed to prepare for trial by neglecting to interview Richardson, defendant has not shown prejudice resulting from the alleged lack of preparation. Further, the record does not support defendant's claim that the victim told Richardson that she lied about the sexual assault because Richardson testified that she did not talk to the victim about the sexual assault. Accordingly, defendant has not demonstrated that defense counsel was ineffective. *Pickens*, 446 Mich at 302-303, 312.

Defendant's remaining seven allegations regarding defense counsel's alleged ineffectiveness are all factual allegations. Defendant has failed to establish the factual predicate for any of these claims. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) ("[D]efendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel."). On appeal, defendant acknowledges that there is insufficient evidence on the record to prove the allegations. Defendant states that he is "requesting this Court to remand for a

*Ginther*¹ hearing.” Accordingly, it appears defendant is arguing in part that this Court improperly denied his request for a *Ginther* hearing. An appellant may move to remand to the trial court for an evidentiary hearing pursuant to MCR 7.211(C)(1)(a), which requires that the motion “identify an issue sought to be reviewed” and demonstrate that “development of a factual record is required for appellate consideration of the issue.” A motion filed pursuant to MCR 7.211(C)(1)(a) “must be supported by affidavit or offer of proof regarding the facts to be established at a hearing.” Defendant failed to support his motion for remand with an affidavit or other offer of proof; accordingly, this Court properly denied his request.

While defendant failed to establish the factual predicate for his remaining claims of ineffective assistance of counsel and failed to meet the requirements for remand set forth in MCR 7.211(C)(1)(a), we will address each claim because we conclude that even if defendant’s factual allegations are assumed true, defendant has not succeeded in demonstrating that any of his factual allegations demonstrate that defense counsel was ineffective.

Defendant first claims that he told defense counsel that he previously had sexual intercourse with the victim. Even assuming that allegation is true, defense counsel reasonably could have declined to bring up defendant’s previous sexual intercourse with the victim in order to avoid subjecting defendant to possible additional charges because the victim was 15 years old at the time of the trial. A person is guilty of third-degree criminal sexual conduct if the person engages in sexual penetration with another person and “that other person is at least 13 years of age and under 16 years of age.” MCL 750.520d(1)(a). Accordingly, defendant has not demonstrated that defense counsel was ineffective. *Pickens*, 446 Mich at 302-303, 312.

Defendant next claims that defense counsel knew that the victim told defendant that she was 16 years old at the time. The statute criminalizing sexual penetration with a person who is under 16 years of age does not create an exception for cases where the perpetrator believes that the victim was 16 years of age or older. See MCL 750.520d(1)(a). Accordingly, defendant’s belief about the victim’s age was irrelevant to whether he was guilty of violating MCL 750.520d(1)(a); therefore, trial counsel’s failure to bring up the fact that defendant believed the victim was 16 years old did not fall below an objective standard of reasonableness, nor was it prejudicial. *Pickens*, 446 Mich at 302-303, 312.

Next, defendant argues that defense counsel was informed that the victim lied to the police about force and coercion. Defendant also asserts that defense counsel was informed that the victim admitted that she lied about force and coercion to Richardson. Even assuming that someone told defense counsel the victim lied to the police and told Richardson that she lied, defendant does not explain who gave defense counsel that information, whether that person would testify regarding that information, and what evidence there was to support the information. Moreover, regardless of what defense counsel knew, he tested the veracity and credibility of the victim’s testimony through cross-examination, and defense counsel’s decisions about how to question a witness are presumed to be trial strategy, and trial strategy is not ineffective simply because it does not work. *Matuszak*, 263 Mich App at 61. Further, defendant

¹ *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

does not make any argument regarding what action or inaction by defense counsel was deficient, or how any deficiency affected the outcome of trial. Accordingly, even assuming defendant's factual allegations are true, defendant has failed to demonstrate that defense counsel was deficient or that any deficiency affected the outcome of the trial. *Pickens*, 446 Mich at 302-303, 312.

Defendant also argues that defense counsel saw a text message from the victim indicating that she wanted to kiss defendant and have sexual intercourse with defendant. Again, even assuming that statement is true, defense counsel's decision regarding how to cross-examine the victim is presumed to be reasonable trial strategy. *Matuszak*, 263 Mich App at 61. Moreover, defendant does not explain whether the text message was still in existence, or whether it could have been obtained and entered into evidence. Defendant does not even specifically allege that defense counsel's failure to obtain the text message and enter into evidence was deficient; defendant merely states that defense counsel saw such a message. Defendant does not explain how this fact, even if true, prejudiced his case. Accordingly, defendant has not demonstrated that defense counsel was ineffective. *Pickens*, 446 Mich at 302-303, 312.

Finally, defendant argues that defense counsel failed to properly advise him regarding the sentencing guidelines and three plea offers made by the prosecutor. Specifically, defendant argues that "in plea rejections" defense counsel improperly informed him that his minimum sentence guidelines range was 51 to 85 months when the range was actually 81 to 135 months. Defendant does not include any argument regarding how this improper advice affected the outcome of his trial. Defendant does not state what the plea offers were, and he does not maintain that given proper advice regarding the offers he would have accepted them. Because defendant failed to make any argument regarding how defense counsel's alleged deficiency prejudiced his case, we conclude that defendant has failed to meet his burden of demonstrating that defense counsel was ineffective. *Id.*

III. SUFFICIENCY OF THE EVIDENCE

Defendant also argues that there was insufficient evidence to support the jury's guilty verdict in regard to the first-degree criminal sexual conduct charge.

We review a challenge to the sufficiency of the evidence de novo. *McGhee*, 268 Mich App at 622. We view the evidence in a light most favorable to the prosecution to determine whether a rational jury could find that each element of the crime was proved beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

A person is guilty of first-degree criminal sexual conduct if "he or she engages in sexual penetration with another person and . . . [t]he actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration." MCL 750.520b(1)(f). "Personal injury" means "bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ." MCL 750.520a(n). "Mental anguish" is defined as "extreme or excruciating pain, distress, or suffering of the mind." *People v Petrella*, 424 Mich 221, 227; 380 NW2d 11 (1985). "Force or coercion" includes "[w]hen the actor overcomes the victim through the actual application of physical force or physical violence." MCL 750.520b(1)(f)(i). "[T]he prohibited 'force' encompasses the use of force against a victim

to either induce the victim to submit to sexual penetration or seize control of the victim in a manner to facilitate the accomplishment of sexual penetration without regard to the victim's wishes." *People v Carlson*, 466 Mich 130, 140; 644 NW2d 704 (2002).

Defendant first claims that there was insufficient evidence of personal injury. In *Petrella*, 424 Mich at 270-271, this Court identified several factors that can constitute evidence of mental anguish, and mental anguish constitutes personal injury. MCL 750.520a(n). Evidence that the victim was upset and crying after the assault, that the victim needed psychological treatment as a result of the assault, interference with the victim's ability to conduct a normal life, evidence that the victim required medication to treat mental symptoms, evidence that the emotional or psychological effects of the assault were long-lasting, and lingering fear of another assault were all factors that tended to support a finding of mental anguish. *Id.* In this case, the evidence was sufficient for a rational jury to find that the victim suffered personal injury in the form of mental anguish. The evidence demonstrated that the victim cried and was sad after the rape. She thereafter went through counseling, took antidepressant pills, lost her faith, and withdrew from people because she was afraid. The victim's grandmother testified that the victim would wake up in the middle of the night screaming. Moreover, because of the rape, the victim tried to overdose on medication. Accordingly, we conclude that the evidence, viewed in a light most favorable to the prosecution, is sufficient to prove that the victim suffered personal injury in the form of mental anguish.

Defendant also claims that there was insufficient evidence that force or coercion was used to accomplish the sexual penetration. In this case, the evidence showed that the victim told defendant that she did not want to engage in sexual activity with him, and defendant got angry. The security video depicted defendant trying to pull the victim's pants down several times, consistent with the victim's testimony. The victim testified that she succeeded in pulling her pants back up twice, but the third time defendant pulled her pants all the way down. Defendant picked the victim up and put her on the floor. Defendant grabbed the victim's hands and placed his body on top of her so she could not move. Then defendant engaged in digital and penile penetration of the victim's vagina. The victim testified that while defendant was penetrating her, she told defendant that she did not want to have sex about 15 times. The victim testified that she never willingly kissed or embraced defendant. The victim was unable to pull her pants up and leave until defendant decided to let her up. We conclude that this evidence, when viewed in a light most favorable to the prosecution, is sufficient to prove force or coercion was used in the form of the actual application of physical force. Accordingly, we conclude that there was sufficient evidence to support the jury's verdict in regard to the first-degree criminal sexual conduct conviction.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Henry William Saad